**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **National Association of State Utility** | ) | **CG Docket No. 04-208** |
| **Consumer Advocates' Petition for** | ) | |
| **Declaratory Ruling Regarding Monthly** | ) | |
| **Line Items and Surcharges Imposed** | ) | |
| **By Telecommunications Carriers** | ) | |

# COMMENTS OF VERIZON WIRELESS


**VERIZON WIRELESS**

John T. Scott, III
Charon Phillips
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
(202) 589-3740

Its Attorneys


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## SUMMARY

The Commission should deny the NASUCA *Petition*, which asks for a declaratory ruling that telecommunications carriers may not include line item charges on customer bills other than charges that are mandated by law.

First, the FCC has already decided to permit carriers to place line items on their bills, including line items that are *not* mandated. NASUCA does not seek clarification of existing law, but rather seeks to *change* that law. That request is inappropriate as a petition for declaratory ruling. NASUCA's petition is in effect either an untimely petition for reconsideration or a petition for rulemaking. NASUCA thus cannot be granted the request it seeks.

Second, Congress and the FCC have purposefully created a national regulatory scheme for CMRS that has in turn enabled the growth of national and regional service providers and calling plans, developments that the FCC has found promote competition and serve the public interest. The *Petition* would undermine this national plan by permitting states and local governments to impose widely varying taxes and fees on the wireless industry without being accountable to consumers, who without line items have no way to know the impact of the actions of these governmental bodies. CMRS carriers would be forced to imbed these cost in their monthly access rates, either by varying those rates from state to state or even city to city within one state, undermining the clear benefits of national and wide-area rate plans. Alternatively, to maintain consistent price plans across jurisdictions, CMRS carriers would be forced to average these widely disparate taxes and fees across all of their subscribers, forcing subscribers in low-tax

jurisdictions to subsidize subscribers in high-tax jurisdictions. Neither result serves the public interest.

Third, the restriction NASUCA proposes would be an unconstitutional restraint on commercial speech because it would muzzle carriers from communicating truthful information to their customers about the taxes and other charges carriers incur. There is no countervailing government interest in prohibiting all non-mandated line items on bills that could support this effort to muzzle carriers' First Amendment rights.

Fourth, NASUCA's allegations as to Verizon Wireless's line item charges are factually unsupported and in any event incorrect. Verizon Wireless ensures that customers' monthly fees, mandated taxes and surcharges, and non-mandated fees and surcharges are described in clear and conspicuous communications and are fully disclosed at time of sale, in other collateral, and in all customer bills. Verizon Wireless's bills clearly separate these categories of charges. Verizon Wireless's billing practices fully comply with the Commission's Truth-in-Billing rules. The Commission should therefore reject NASUCA's claim that Verizon Wireless's surcharges are unlawful.

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## COMMENTS OF VERIZON WIRELESS

Verizon Wireless respectfully submits comments on the *Petition*[1] filed by the National Association of State Utility Consumer Advocates ("NASUCA") in the captioned proceeding. Verizon Wireless urges the Commission to deny the *Petition.*

In its *Petition,* NASUCA asks the Commission to issue a sweeping declaratory ruling that would prohibit all line-item charges, surcharges, or other fees, unless such charges have been expressly mandated by government law or regulation.[2] NASUCA also seeks a declaration that line items that are allowed must closely match those mandatory assessments.[3]

The Commission should deny the NASUCA *Petition* for multiple independent reasons. First, as a threshold matter, the *Petition* is defective because the Commission, in its Truth-in-Billing docket, expressly decided that carriers may lawfully impose line item charges, including charges that were not required by federal or state law to appear on customer bills. What NASUCA wants is for the Commission to change its prior decision.

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1 National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format, filed March 30, 2004.

2 *Id.* at 1.

3 *Id.* at 66.

But in this regard the *Petition* inappropriately asks for either reconsideration out of time or a rule change in a request for declaratory judgment. Under the Commission's rules and the Administrative Procedure Act ("APA"), parties seeking reconsideration must file within 30 days of a final order, a deadline that has long since passed for the Truth-in-Billing order, and requests for rule change must be made in a petition for rulemaking, not a petition for declaratory ruling.

Second, with its *Petition*, NASUCA seeks to do indirectly through the Commission what states cannot do directly – suppress wireless carriers' right to impose line item charges. The success of the wireless industry has made it a target for myriad taxes, fees, and surcharges imposed by state, county and municipal governments. NASUCA seeks to give state and local governments free reign to impose these charges on wireless carriers and their customers without being accountable to consumers, who without line items have no way to know the impact of the actions of these authorities. If the Commission were to grant NASUCA's request, carriers that do business in multiple states such as CMRS carriers would have no choice but to imbed these costs in their rates to end users. This would result in carriers either averaging rates across multiple jurisdictions or creating hundreds of different rate plans tied to the customer's jurisdiction. Neither result serves the public interest. The first result would effectively force customers in low-tax jurisdictions to subsidize customers in high-tax jurisdictions. The alternative would force carriers to dismantle the pro-competitive, national and regional rate plans that the FCC itself has found have intensified wireless industry competition and allowed customers to comparison shop.

Third, the restriction NASUCA proposes would be unconstitutional because it would have this Commission violate the First Amendment by prohibiting commercial speech and muzzling carriers' right to communicate truthful information to their customers. Rather than placing across-the-board and impermissible restrictions on all carriers' rights to commercial speech by prohibiting all such charges, the appropriate way to deal with concerns that a particular line item may be unfair or deceptive is to enforce remedies that existing law and FCC rules already provide for policing such practices. .

Finally, NASUCA bases its request on its supposition that all line-item charges are misleading and deceptive. This generalization is overbroad and Incorrect. Carriers have the incentive in a competitive marketplace to disclose and describe their billing practices in a fair manner. Verizon Wireless makes constant efforts to ensure that it discloses all charges, including line item charges, to customers both at point of sale and on its bills. NASUCA. The Commission should therefore reject NASUCA's cursory and conclusory claim that Verizon Wireless's surcharges are unlawful.

## I. NASUCA SEEKS EITHER RECONSIDERATION OUT OF TIME OR A RULEMAKING, NOT A DECLARATORY RULING

NASUCA filed its *Petition* pursuant to 47 C.F.R. § 1.2, which permits requests for declaratory ruling. Declaratory rulings are appropriate to terminate a controversy or remove uncertainty.[4] Neither exists in this case.

### A. Federal Law Permits Surcharges

The *Petition* is not the first time the FCC has considered whether to require carriers to state their charges without separate fees on telecommunications bills. In the Commission's Truth-in-Billing docket, NASUCA urged the Commission to require

[4] 47 C.F.R. § 1.2.

carriers to disclose on consumers' bills the average cents per minute paid by the customer, including any separate fees for access or universal service.[5] Other commenters in the docket specifically asked the FCC to prohibit carriers from separately stating fees from regulatory action.[6] The FCC rejected this approach, stating that "[w]e decline at this time to mandate such requirements, but rather prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates, or to list the charges in separate line items…. We believe that so long as we ensure that consumers are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner. Moreover, we are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures."[7]

In the *TIB Order,* the FCC not only approved line item charges like those Verizon Wireless includes on its bills, but also confirmed that only minimal billing rules were necessary, and that this was particularly the case for CMRS. In that context, the FCC determined that "[t]he record does not, however, reflect the same high volume of customer complaints in the CMRS…context, nor does the record indicate that CMRS billing practices fail to provide consumers with the clear and non-misleading information

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5 Comments of NASUCA, CC Docket No. 98-170, at 5 (filed Nov. 13, 1998).

6 *See* Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 7492, 7501 ¶ 55 n.151 (1999) ("*TIB Order*") (*citing* Reply Comments of RUS, CC Docket No. 98-170, at 11-12 ("[E]fforts to break out new line items as universal service fees are misleading to consumers, particularly since none of the other costs of the business, such as advertising, stock options, or salaries, are highlighted in this manner…A separate line item charge for universal service may disguise a rate increase, or allow a carrier to advertise an apparently low per-minute rate, a rate [that] doesn't actually exist once the line item is added to the bill.")

7 *TIB Order,* 14 FCC Rcd at 7526-7, ¶ 55.

they need to make informed choices."[8] Based on this conclusion, the FCC applied only two of the requirements applicable to landline carriers -- that CMRS bills identify the name of the service provider and a toll-free number for customer inquiries.[9]

The FCC has also specifically approved the use of line items in various other contexts. For example, with respect to universal service, the FCC has permitted carriers to recover their contributions to the federal universal service program, provided that, if "carriers recover their contribution costs through a separate line item on customer bills, they must accurately describe the nature of the charge."[10] The Commission has also permitted carriers not subject to rate regulation such as CMRS providers to "recover their carrier-specific costs directly related to providing number portability in any lawful manner consistent with their obligations under the Communications Act."[11] Contrary to the declaration NASUCA seeks from the FCC, neither of these surcharges is mandated by the FCC, yet both are lawful under existing FCC orders.

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8 *Id.*, 14 FCC Rcd at 7501-02, ¶ 16.

9 *See* 47 C.F.R. § 64.2401.

10 Federal-State Joint Board on Universal Service*, Report and Order and Second Notice of Proposed Rulemaking,* 17 FCC Rcd 24952, ¶ 42 (2002) ("*USF Contribution Order*").

11 Telephone Number Portability, *Third Report and Order,* 13 FCC Rcd 11701, 11774 ¶ 136 (1998) ("*LNP Order*"). S*ee also* Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability, *Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200,* 17 FCC Rcd 252, 255 ¶3 (2001) ("We will allow, but not require, incumbent LECs (ILECs) subject to rate-of-return regulation to recover their carrier-specific costs directly related to thousands-block number pooling implementation through interstate access charges. Carriers not subject to rate regulation, such as competitive LECs (CLECs) and CMRS providers, may recover their carrier-specific costs directly related to implementation of thousands-block number pooling in any lawful manner consistent with their obligations under the Communications Act of 1934, as amended (the Act)").

### B. The APA and FCC Rules Do Not Permit Reconsideration or Rulemaking in a Declaratory Ruling Request

NASUCA states that it is not asking the Commission to overturn its prior decisions permitting carriers to recover certain specific costs or assessments mandated by regulatory action through use of specific line-item charges.[12] Yet, this is exactly what NASUCA is seeking when it requests a ruling that carriers are prohibited from imposing all line item charges unless those charges are specifically mandated by federal, state, or local regulatory action.[13] NASUCA's petition is thus not seeking to "remove uncertainty" arising from past FCC actions – rather, it is seeking to *alter* existing law.

As detailed above, the FCC has not mandated that line item charges be passed through to customers. In the universal service context, for example, the FCC specifically rejected a federally mandated surcharge.[14] The FCC has even stated that a description of universal service charges suggesting that they are "mandated" would not be accurate, and expressly allowed carriers to do what NASUCA would prohibit. With respect to LNP, the FCC has stated that unregulated carriers may recover costs in end-user rates if they "choose to do so."[15]

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12 *Petition* at 65.

13 *Id.* NASUCA also asks the Commission to find that carriers should not be allowed to recover ordinary operating costs by means of surcharges, line items, or fees. *Id.* at 66. The FCC has placed some limits on the assessments that carriers can pass along to their customers in the context of universal service and local number portability. *See, e.g.*, *USF Contribution* Order, 17 FCC Rcd at 24978, ¶ 49 (precluding universal service assessments above contribution amounts); *LNP Order*, 13 FCC Rcd at 11774, ¶ 136 (carriers may recover carrier-specific costs directly related to number portability). The FCC has not, however, adopted any general rules governing the types of expenses that carriers may recover in surcharges but has instead cautioned carriers that Section 201(b) continues to apply in this context. *TIB Order*, 14 FCC Rcd at 7528, ¶ 57.

14 Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 9210-11, ¶¶ 852-54 (1997).

15 *LNP Order*, 13 FCC Rcd at 11775, ¶ 139.

In the *Petition,* NASUCA is clearly asking the Commission in a declaratory ruling to revisit, and reverse, its decisions in the Truth-in-Billing and other dockets to permit line-item surcharges. Given that commenters in the Truth-in-Billing docket asked the FCC to prohibit line-item surcharges and the FCC refused to do so, NASUCA's request amounts to little more than a request for reconsideration out of time. Under the Commission's rules, parties have 30 days from the date of a final action to file petitions for reconsideration.[16] NASUCA's request long exceeds this 30-day period.

NASUCA's *Petition* is also procedurally deficient in that it appears to seek a rule change. The FCC has refused to prohibit line items and has not distinguished between line items that are mandated by government action and those that are not mandated. Under the APA, as well as the FCC's own rules, declaratory ruling requests are by their nature an adjudication of existing law,[17] whereas rulemakings are the agency process "for formulating, amending, or repealing a rule."[18] Because NASUCA seeks to establish an

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[16] 47 C.F.R. § 1.429(d); *see also* 47 U.S.C. § 405.

[17] *See* 5 U.S.C. § 554(e), which states: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." *See also* Stein, Mitchell, Mezines, Matthew Bender Administrative Law § 33.04 (Vol. 4, 2004) ("An agency is also authorized to issue declaratory orders for the purpose of removing uncertainty as to interpretation of law"); Separate Statement of Commissioner Kathleen Q. Abernathy, Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, *Order,* 19 FCC Rcd 7457, 7476 (2004) ("A number of parties have suggested deferring resolution of this issue and deciding it in the pending rulemaking on IP-enabled services. While I understand the desire for a comprehensive approach, I believe such arguments misapprehend the difference between a declaratory ruling proceeding and a rulemaking. The former clarifies the *existing* state of the law, while the latter establishes *new* rules (which may modify or eliminate existing rules). It is not possible for the Commission to elucidate carriers' *existing* obligations in a rulemaking.")

[18] 5 U.S.C. § 551(5). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). *Compare* Section 1.2 (declaratory rulings) *with* 1.411 (petitions for rulemaking).

entirely new and much more restrictive rule for billing in the context of a declaratory ruling, the *Petition* must be dismissed.

## II. NASUCA'S REQUEST WOULD UNDERMINE THE NATIONAL PLAN OF CONGRESS AND THE FCC FOR CMRS

In its *Petition,* NASUCA is asking the FCC to do indirectly what the states and local bodies cannot do directly, which is to use CMRS carriers as a target for all manner of state and local taxes, surcharges, and fees while at the same time dictating that consumers who ultimately bear the cost of these programs cannot know about them. These agencies have increasingly turned to the wireless industry as a ready source for funds. The total impact of these charges varies by jurisdiction, but it can range from 8 to 30 percent of the total wireless bill depending on the state, county and city involved. Customers in neighboring counties may pay different charges because those counties have different taxes, E-911 fees and other charges. Wireless carriers are also being singled out. Whereas the weighted average impact of government-initiated programs on the typical main street business is only 6.93 percent, the impact on wireless consumers is 16.2 percent.[19]

It is well settled that the Commission has broad authority over CMRS pursuant to Section 332(c) of the Communications Act.[20] The Commission relied upon this authority when it adopted its truth-in-billing rules, stating that Section 332 provides it "with jurisdiction to enact [truth-in-billing] rules concerning CMRS carriers.[21] Under

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[19] Scott Mackey, *The Excessive State and Local Tax Burden on Wireless Telecommunications Service,* State Tax Notes, forthcoming July 19, 2004.

[20] 47 U.S.C. § 332(c).

[21] *TIB Order,* 14 FCC Rcd at 7503, ¶ 21 n.35.

Section 332(c)(3), and its conforming amendment to Section 2(b),[22] "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service."[23] Congress amended section 2(b) of the Communications Act to *exclude* wireless phone services from the general prohibition on FCC regulation of *intrastate* telecommunications services, thereby exempting wireless services in part from the system of dual state and federal regulations that governs traditional land-based or wireline, telephone services. 47 U.S.C. § 152(b). Congress determined that this broad grant of federal jurisdiction was necessary in order to provide a uniform regulatory framework for all CMRS offerings, which, "by their nature, operate without regard to state lines."[24]

Although Section 332(c)(3) prohibits states from regulating CMRS rates and entry, it permits states to regulate the terms and conditions under which CMRS is provided. Section 332 does not define rates and entry or terms and conditions, but the

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22 "*Except as provided in …section 332* … nothing in this Act shall be construed to apply or to give the Commission jurisdiction … over intrastate communication service." 47 U.S.C. § 152(b) (emphasis added).

23 47 U.S.C. § 332(c)(3).

24 H.R. Rep. No. 103-111, at. 260 (1993).

FCC has made it clear that rates include rate elements and rate structures.[25] Separate line item charges are clearly "rate elements."[26]

The FCC has further determined that if a state were to require CMRS carriers to recover their contributions to state programs through the rates they charge their customers, rather than as separate line items, this would be unlawful rate regulation. In the *Pittencrieff* case, although the Commission found "that a requirement for CMRS providers to contribute on an equitable and nondiscriminatory basis to state universal service support mechanisms falls within a state's lawful authority and therefore falls within the 'other terms and conditions' language of section 332(c)(3)(A),"[27] the FCC also established that Section 254 did not override the preemption of state authority to regulate rates found in Section 332. The FCC determined that because the Texas statute in

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[25] Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order,* 14 FCC Rcd. 19898, 19907 ¶ 20 (1999) ("*SBMS Order*") (finding "that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.")

[26] *See, e.g., USF Contribution Order,* 17 FCC Rcd at 24979, ¶ 53 n.133 ("incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*") (emphasis added); Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service, *Sixth Report and Order in CC Docket No. 96-262,* 15 FCC Rcd 12962, 13057-58, ¶¶ 218-19 (2000) (approving plan permitting local phone companies to establish a "*separate rate element (*e.g.*, line item)*" to recover federal universal service contributions) (emphasis added).

[27] Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order,*13 FCC Rcd 1735, 1737 ¶ 4 (1997) ("*Pittencrieff Order*"), *pet. for review denied sub nom. Cellular Telecomm. Indus. Ass'n v. FCC,* 168 F.3d 1332 (D.C. Cir. 1999).

question did "not direct the CMRS providers to recover their contributions" to the state universal service programs "through the rates they charge their customers, we find the Texas statute does not implicate the prohibition on state regulation in section 332(c)(3)."[28] In contrast, any attempt by a state to direct how CMRS providers recover contributions to state programs from their customers, in particular by forcing them to bury those charges in monthly access charges, would undermine the goals of Section 332(c)(3).

Based on the clear interest in a national plan for CMRS, and the adverse impact on customers and competition that would result, the FCC should reject the NASUCA *Petition.* Like other CMRS providers, Verizon Wireless markets and prices its services on a nationwide and regional basis. And, like other CMRS providers, Verizon Wireless recovers the costs of state and local taxes, surcharges, and fees that it is required or permitted to pass on to consumers through separately stated line-item charges on its customers' monthly bills. This allows Verizon Wireless and other CMRS providers to charge and bill state and local taxes, surcharges, and fees directly to consumers residing in the states and localities imposing such taxes, surcharges, and fees while maintaining the uniform national and regional base rate plans consumers demand.

If NASUCA's request is granted, Verizon Wireless and other CMRS providers will be forced to choose between (1) balkanizing their national and regional base rate plans by creating hundreds, if not thousands, of individual rate plans tied to each individual local taxing jurisdiction in order to account for each taxing jurisdiction's separate taxes, surcharges and fees, or (2) embedding the cost of each state's and each

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[28] *Pittencrieff Order,* 13 FCC Rcd at 1754, ¶ 37.

locality's taxes, fees and surcharges in their national and regional rate plans thus requiring consumers to bear the cost of taxes, fees and charges imposed by other states and localities. Forcing CMRS carriers to create individual rate plans tied to each local jurisdiction is all but impossible and would run counter to the pro-competitive benefits of national and multi-state rate plans. Forcing consumers in a state to bear the cost of taxes, fees, and surcharges imposed by another state or localities located within a state. Either solution would disserve the public interest. If carriers were forced to restructure their rate plans to reflect the widely disparate state and local fees and surcharges in each jurisdiction, they would not be able to continue offering the national or multi-state rate plans that have promoted vigorous competition in the industry. Being able to offer these plans on a consistent basis is important for CMRS carriers, whose service operates without regard to state lines. The alternative is equally problematic; if carriers attempted to maintain consistent national or multi-state rate plans, customers in low-tax jurisdictions would effectively subsidize the fees and surcharges imposed by high-tax jurisdictions.

In addition, requiring wireless carriers to bundle all taxes and line item charges into one comprehensive base rate would confuse, mislead, and deceive consumers by obscuring the true nature of incurred monthly charges. A lump sum rate would further obscure the relationship of the fee charged to the regulatory assessment. As the FCC stated in the *TIB Order*:

> [W]e are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures. Insofar as the regulatory-related charges have different origins, and are applied to different service and provider offerings, we also question whether implementation of a lump-sum figure of all charges

> resulting from federal regulatory action could be presented in a manner in which consumers could clearly understand the origin of such a charge.[29]

Because surcharges have different origins and are applied to different service and provider offerings as noted above, rolling such charges into one lump sum rate could inhibit the ability of consumers to comparison shop. According to NASUCA's argument, CMRS providers should be required to roll all line item charges into a comprehensive base rate, such that consumers would be able to compare "apples to apples." In reality, however, NASUCA's proposal would not have its desired effect. Because surcharges may differ from county to county (such as 911) and may fluctuate quarterly (such as USF), neighboring consumers in two different counties would presumably be subject to two different rates from the same carrier. Moreover, because a surcharge could also vary frequently (the FCC's own Universal Service Contribution Facto is adjusted every calendar quarter), and be applied to different services and providers, NASUCA's proposal would envision a market where rates could fluctuate widely across carriers, across localities and across time, further impairing consumers from comparison shopping and creating even more consumer confusion. In such a world, because of the rate fluctuations based on the factors listed above, this would severely inhibit national and multi-state wireless advertising, since no fair and reasonable national base rate could ever be determined, and also for the national plan for CMRS.

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[29] *TIB Order,* 14 FCC Rcd at 7526-7, ¶ 56.

## III. IT WOULD BE UNCONSTITUTIONAL TO REQUIRE CARRIERS TO IMBED LINE-ITEM CHARGES IN RATES

In the *Petition*, NASUCA is asking the FCC to prohibit carriers from communicating certain monthly charges in the form of line items. The ban that NASUCA proposes on commercial speech would prohibit even truthful carrier speech. Such a restriction would ignore the fact that carriers have an interest in conveying truthful and non-misleading information regarding the details of their billing to their customers, and the fact that consumers have a corresponding interest in receiving truthful information about the charges on their wireless bills.[30] By eliminating the ability to communicate charges in the form of separate line item amounts in bills, the FCC would inhibit the flow of valuable cost information to customers.[31] The Supreme Court has consistently warned against enacting such paternalistic regulation, as it is likely to violate the First Amendment: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to…attempts to deprive consumers of accurate information about their chosen products."[32] The general rule is "that the speaker and the audience, not the government, assess the value of the information presented."[33]

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[30] *See Lorillard Tobacco Co. v Reilly*, 533 U.S. 525, 564 (2001) (finding that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults and adults having a corresponding interest in receiving truthful information about tobacco products).

[31] *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92-94 (1977) (ban on speech struck down because no "satisfactory" alternate channels of communication were left open.)

[32] *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

[33] *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

### A. NASUCA Seeks to Regulate Commercial Speech, not Conduct.

In the *Petition,* NASUCA argues that it is not petitioning the Commission to regulate the content of information carriers provide to their customers, and that such a restriction would therefore not implicate the First Amendment. NASUCA argues instead that it is urging the Commission to regulate the conduct of carriers.[34] NASUCA's argument is contrary to law.[35]

Written communications about commercial information such as a customer's charges is clearly commercial speech, not conduct.[36] Courts have found that to qualify as a regulation of conduct governed by *United States v. O'Brien,*[37] the government's regulation must be unrelated to expression.[38] Here, the restriction on non-government mandated line item charges is an attempt to regulate directly the communicative impact of line item charges on consumers and thus is by definition related to expression.[39]

NASUCA's argument to the contrary simply has no basis. What NASUCA seeks is a prohibition against including written line item charges (*i.e.*, speech, not conduct) in bills, unless specifically mandated by law. NASUCA is not seeking a prohibition against charging customers their line items, and even suggests that these charges should be added

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34 *Petition* at 64.

35 In evaluating NASUCA's petition, the Commission should be mindful of carrier First Amendment rights that prevent it from restricting truthful carrier communications and information to customers. See, e.g., U.S. West Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999) (finding unconstitutional FCC rules governing carrier communications to customers).

36 *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 670 (1985) (use of illustrations or pictures in advertising are entitled to the First Amendment protections afforded verbal commercial speech.)

37 *United States v. O'Brien,* 391 U.S. 367 (1968).

38 *See Lorillard*, 533 U.S. at 567.

39 *Id.*

to the carriers' monthly and usage charges (*i.e.*, the conduct).[40] Thus, NASUCA is seeking a ban on commercial speech, not on conduct.

### B. NASUCA'S Request Does Not Satisfy the *Central Hudson* Standard.

Because NASUCA's request would require the government to regulate commercial speech, it must survive the Supreme Court's four-part intermediate scrutiny analysis in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[41] to be lawful. Under the *Central Hudson* test, the government action must seek to regulate expression protected by the First Amendment. "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."[42] The next step is to "ask whether the asserted government interest is substantial."[43] If both of these inquiries yield positive answers, then the third and fourth steps are to "determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[44]

Commercial speech is expression related solely to the economic interests of the speaker and its audience.[45] Line item charges clearly fall within this definition. For commercial speech to be protected by the First Amendment, it must concern a lawful activity and not be misleading.[46] Contrary to NASUCA's argument that all surcharges that are not mandated by the government are misleading, carriers that seek to disclose the exact nature of charges through specific line item entries on a consumer's bill are

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40 *Petition* at 66, n. 171.
41 *Central Hudson*, 447 U.S. 557, 566 (1980).
42 *Id.*
43 *Id.*
44 *44 Liquor Mart,* 517 U.S. at 500 (quoting *Central Hudson*, 447 U.S. at 566).
45 *Central Hudson,* 447 U.S. at 561.
46 *Id.* at 564.

communicating "truthful, non-deceptive information proposing a lawful commercial transaction."[47] Such types of communications have been found to be protected commercial speech.[48] Because these line items relate to lawful activity and are not false or misleading, they are fully protected commercial speech.[49]

Once found to be protected commercial speech, under the test of *Central Hudson* a restriction on such speech may be upheld only if it "advances [a substantial government] interest[] in a direct and material way."[50] In other words, a commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose."[51] In its *Petition*, NASUCA does not even attempt to describe a substantial government interest in banning the use of line item charges from CMRS carriers' telephone bills. However, assuming that the government interest would be ensuring that consumers receive accurate and non-misleading information concerning their monthly telephone charges, as discussed below, NASUCA's proposal would make illegal even accurate and truthful billing information, thereby violating the First Amendment.

The third step of *Central Hudson* requires that the speech restriction directly and materially advance the asserted government interest.[52] The regulation "may not be sustained if it provides only ineffective or remote support for the government purpose.'"[53] Moreover, "this burden is not satisfied by mere speculation or conjecture; rather, a

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47 *Edenfield,* 507 U.S. at 765.
48 *Id*.
49 *Central Hudson,* 447 U.S. at 563.
50 *Edenfield*, 507 U.S. at 762.
51 *Id.* at 770 (*citing Central Hudson,* 447 U.S. at 564).
52 *Central Hudson,* 447 U.S. at 564.
53 *Edenfield,* 507 U.S. at 770 (citing *Central Hudson,* 447 U.S. at 564).

government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[54] In the instant case, NASUCA has not only failed to identify what the government interest is, it has not offered any evidence that the regulation it seeks would directly advance the assumed government interest of ensuring consumers receive accurate and non-misleading information on their telephone bills. Instead, NASUCA seeks to ban all line-item charges on carriers' bills not mandated by regulatory actions, including truthful and non-misleading line item charges. However, "if the protections afforded commercial speech are to retain their force [the court] cannot allow the rote invocation of the words 'potentially misleading' to supplant the [government's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[55]

In fact, instead of advancing the government interest, the proposed regulation would have the opposite effect. It would end up preventing consumers from obtaining truthful and non-misleading line item surcharge information, which would limit the amount of information available to assist the consumer in making an informed decision. The wireless telephone market today is made up for the most part of national and large regional providers who compete with each other on a national or multi-state basis. In this type of highly competitive environment, carriers are forced to run large-scale national or regional advertising campaigns that attempt to communicate their company's benefits clearly and efficiently to the consumer. Features such as airtime minutes, types of

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[54] *Id.* at 770-71.

[55] *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (citations omitted).

phones, and standard monthly service rates are well suited for campaigns aimed at a wide audience. However, although in terms of advertising carriers must think broadly, they must also think locally in terms of their business. Each state, and at times each county, may impose different regulations on wireless providers with which they must comply in order to do business in that jurisdiction.

If, as NASUCA proposes, a CMRS carrier were forced to embed the costs of complying with each locality's fees and charges into their standard monthly fees, it would severely impede the carrier's ability to advertise its monthly rate on a national basis. This is because the line-item charges vary from state to state, and even from county to county, and thus including them in the monthly rate would create different rates depending on the consumer's location. Contrary to NASUCA's suggestion, its requested regulation would not allow consumers to shop among carriers making "apples-to-apples" comparisons on rates.[56] Consequently, NASUCA's proposed ruling fails the third step of *Central Hudson*.

Moreover, even assuming that the proposed regulation directly advances the government interest asserted, which it does not, for the ban on line-item charges to pass First Amendment scrutiny, it would also have to meet the fourth step of *Central Hudson*, which requires that the regulation be no more extensive than necessary. "The fourth step of Central Hudson requires a reasonable fit between the [government's] ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective."[57] Assuming that the government's interest is in ensuring that the consumer receive full and accurate information in their bills, the means chosen by NASUCA to

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[56] *Petition* at 66.

[57] *Florida Bar v. Went-For-It, Inc*., 515 U.S. 618,632 (1995).

advance that interest – a complete ban on all non-government mandated line item charges – is not narrowly tailored to achieve the desired objective.[58] Banning line item charges would not only eliminate potentially confusing speech but also perfectly legitimate and clear speech. Courts are thus reluctant to uphold blanket bans on commercial speech.[59]

An FCC regulation banning all line item charges on wireless bills could have widely disparate effects nationwide. Customers living in jurisdictions that impose heavy government mandates may be charged a higher monthly rate for CMRS service than customers in jurisdictions with lighter mandates, but they would not know why. The complete lack of detailed billing information would only serve to confuse customers. In the end, the uniformly broad sweep of the ban demonstrates that it is not narrowly tailored, as required by *Central Hudson*.[60]

### C. NASUCA's Request is Also Impermissible as Content-Based Regulation and as a Blanket Ban.

It is clear that under the *Central Hudson* analysis, the proposed regulation would be prohibited under the First Amendment. However, it is not only as a restriction on "commercial speech" that the regulation does not pass Constitutional muster. It also would fail if considered to be a content-based regulation.

Because the proposed regulation seeks to ban certain line item charges (any not governmental mandated) while allowing others (those that are governmentally mandated), it could be considered a content-based restriction. Its application depends only on the content of the communication, prohibiting the printing on bills only those line

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58 *Id*.

59 *See e.g. Central Hudson,* 447 U.S. at 566, n.9 ("in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.")

60 *See Lorillard*, 533 U.S. at 563-564.

item charges that are imposed by carriers. As a content-based regulation, such a restriction would be "presumptively invalid" and would clearly not pass Constitutional muster under a strict scrutiny analysis.[61] The proposed regulation cannot survive strict scrutiny because, as previously discussed, it cannot even survive the intermediate scrutiny test of *Central Hudson*. Nothing in NASUCA's proposed regulation identifies a "compelling government interest."[62] Furthermore, even if one was found, as explained above, the proposed regulation is not "narrowly tailored" to serve the compelling interest.[63]

Finally, a ban on all non-government mandated line item entries cannot be found to be a reasonable restriction on the manner of communication, rather than a direct regulation on the commercial speech itself.[64] Assuming that a flat ban on commercial solicitation might be regarded as a content-neutral blanket restriction, the government may impose reasonable restrictions on the time, place and manner of protected speech only if the restrictions are "justified without reference to the content of the speech…are narrowly tailored to serve a significant government interest, and…leave open ample alternative channels for communication of the information."[65] This is fundamentally the same standard as *Central Hudson*, and, just like under *Central Hudson*, the proposed regulation would not pass muster under this content-neutral analysis for a blanket ban.

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[61] *Reno v. ACLU*, 521 U.S. 844 (1997) (If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

[62] *Reno,* 521 U.S. at 879.

[63] *Id*.

[64] *Edenfield,* 507 U.S. at 773.

[65] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *citing Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984).

For the foregoing reasons, NASUCA's proposed regulation banning the printing of all non-government mandated line item charges on CMRS carriers' bills is unconstitutional under the First Amendment.

## IV. VERIZON WIRELESS'S BILLS COMPLY WITH FEDERAL LAW

In its *Petition*, NASUCA specifically discusses the billing practices of numerous carriers, including Verizon Wireless. NASUCA alleges that Verizon Wireless's surcharges violate the *TIB Order*, and are unjust and unreasonable and contrary to 47 U.S.C. § 201(b) and 47 U.S.C. § 202.[66] The Commission should reject all of these arguments.

### A. CMRS Providers Are Not Subject to the Relevant Portions of the *TIB Order,* But Verizon Wireless Nonetheless Complies With Its Requirements

NASUCA makes the nonsensical argument that although the *TIB Order* did not apply the requirement that CMRS bills must contain full and non-misleading descriptions of charges, wireless carriers' surcharges should be declared unlawful anyway because the FCC indicated that CMRS providers would be required to comply with any FCC–imposed standardized labels for charges resulting from Federal regulatory action.[67] But being subject to a labeling requirement is very different from being prohibited from placing surcharges on the bill in their entirety. As previously discussed, the FCC's *TIB Order* requirement that bills contain full and non-misleading descriptions of charges does not apply to CMRS providers. Nevertheless, Verizon Wireless's monthly customer billing statements ("Bills" or "Bill") fully comply with these principles.

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[66] *Petition* at 33, 44.

[67] *Id.* at 26-7. Elsewhere in the *Petition,* NASUCA concedes that the FCC has never finalized rules regarding standardized labels. *Id.* at 8 n.16.

Verizon Wireless's billing practices are consistent with the FCC's and FTC's efforts to help consumers understand the nature, origin, and cost of all telecommunication charges. Indeed, Verizon Wireless believes that providing accurate and truthful billing information is critical to consumers' ability to make informed choices in a competitive wireless market. Clearly organizing and disclosing all charges to consumers for wireless services is acutely necessary in today's marketplace, because dissatisfied consumers can take their service elsewhere, particularly given the advent of wireless local number portability. The "truth-in-billing" principles in the *TIB Order* require the following:

> First, that consumer telephone bills be clearly organized, clearly identify the service provider, and highlight any new providers; Second that bills contain full and non-misleading descriptions of charges that appear therein; and Third that bills contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges, on the bill.[68]

As discussed more fully below, Verizon Wireless's Bills are clearly divided into simple easy-to-understand sections, the Bills clearly and conspicuously characterize, display, and explain all discretionary line item charges, and are not otherwise misleading or deceptive in any way.

### 1. Verizon Wireless's Customer Billing Statements Are Clearly Organized and Clearly Designate and Separate All Line Item Charges

Verizon Wireless's Bills are broken down into simple sections that clearly and conspicuously characterize, display, and explain all discretionary line item charges, as

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[68] *TIB Order*, 14 FCC Rcd at 7501, ¶ 5.

well as all other monthly charges.[69] Currently, Verizon Wireless divides its Bills into five separate sections: (i) "Monthly Access;" (ii) "Additional Services;" (iii) "Home Usage and Charges;" (iv) "Taxes, Governmental Surcharges and Fees;" and (v) "Verizon Wireless Surcharges." All amounts listed in the "Monthly Access," "Additional Services" and "Home Usage and Charges" sections of the Bills are comprised solely of costs incurred by a customer's use of his or her wireless phone. "Monthly Access" charges are charges for access to the Verizon Wireless network, and the amount of this fee is determined by the price plan selected by the customer. "Additional Services" are charges for enhanced optional wireless services such as text messaging, mobile web access or entertainment-related features, and the amount charged is determined by the services selected by the customer. "Home Usage and Charges" are charges for a customer's incurred minutes of billable airtime.

The "Taxes, Governmental Surcharges and Fees" section of the Bills is the section which lists governmental surcharges and fees that Verizon Wireless is required by law to collect from customers, including, for example, the 3% federal excise tax,[70] state and local sales taxes,[71] and other government-mandated collections such as local E-911 fees and utility taxes.[72] Verizon Wireless is required by federal, state, and/or local law to impose all of these taxes, surcharges, and fees, and they constitute the sole components of the "Taxes, Governmental Surcharges and Fees" section of the Bills. No discretionary

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[69] It should be noted that Verizon Wireless also complies with the other "truth-in-billing" principles by clearly identifying Verizon Wireless as the service provider and clearly and conspicuously providing phone numbers and a mailing address for customer service issues on the first page of all Verizon Wireless Bills.

[70] 26 U.S.C. § 4251 *et. seq.* (federal excise tax on communication services).

[71] *See, e.g.,* New York Tax Law § 1105 (New York state sales tax).

[72] *See, e.g.,* Va. Code § 58.1-3812 (authorizing local consumer utility tax on consumers of local mobile telecommunications service).

line item charges, or any other charges or fees, appear in the "Taxes, Governmental Surcharges and Fees" Bill section.

At this time, the "Verizon Wireless Surcharges" section of the Bills includes (i) the Federal Universal Service Charge (the "FUSF") and (ii) a "Regulatory Charge" that consists of an amount representing the recovery of fees charged by government entities to Verizon Wireless, as well as the costs of complying with certain governmental mandates. As detailed above, the FCC has permitted carriers to recover their contributions to the Federal universal service program. The amount set forth as the "Regulatory Charge" is comprised of charges and costs that are directly related to five categories of fees imposed by the federal government on Verizon Wireless to fund activities and expenses including the following: (i) telecommunications relay services for persons with hearing and speech disabilities; (ii) local number portability; (iii) administration of the United States portion of the telephone numbering system for North America; (iv) costs from the provision of local number portability; and (v) FCC annual regulatory fees that are imposed pursuant to Section 9 of the Communications Act. (collectively, the "Regulatory Charge").

No part of the Regulatory Charge constitutes an effort by Verizon Wireless to make a profit outside of its base rate structure or to misleadingly or deceptively pass discretionary costs on to customers under the guise of government-mandated taxes. Rather, the Regulatory Charge is used to recoup payments made and costs incurred by Verizon Wireless as the result of regulatory mandates..

To ensure that customers are not confused as to the source of the Regulatory Charge or of any other line item charge, such charges do not appear under the "Taxes, Governmental Surcharges and Fees" section of the Bills. Furthermore, Verizon Wireless

does not mischaracterize or mislabel these line item charges in an effort to cloak such charges as government-mandated taxes. To the contrary, the Regulatory Charge and all other line item charges are clearly and conspicuously listed under the section of the Bills currently called "Verizon Wireless Surcharges", so that there is no confusion to Verizon Wireless customers that these are discretionary charges imposed by Verizon Wireless, and not taxes required to be collected from customers by federal, state or local governments.

### 2. Verizon Wireless's Bills Contain Full and Non-Misleading Descriptions of all Line Item Charges

Verizon Wireless makes extraordinary and industry-leading efforts to disclose all charges to its customers, whether such disclosures appear on its Bills, at the point of sale, or in its advertising. Not only does Verizon Wireless clearly organize line item charges into their own separate section of the Bills as discussed above, Verizon Wireless also provides its customers with detailed explanations of billed charges. Each bill currently contains the following information:

> **Verizon Wireless' Surcharges** includes charges to recover or help defray costs of taxes and of governmental surcharges and fees imposed on us, and costs associated with government regulations and mandates on our business. These charges include a Regulatory Charge, which helps defray costs of various mandates, including the FCC's local number portability requirements, and a Federal Universal Service Charge, and, if applicable, a State Universal Service Charge to recover costs imposed on us by the government to support universal service. *These charges are Verizon Wireless charges, not taxes, and are subject to change*. (emphasis added)

This explanation could not be considered vague or misleading in any respect. In fact, this explanation could not be any clearer in conveying that the Verizon Wireless

Surcharges are not taxes, but discretionary charges imposed on the customer by Verizon Wireless in order to recoup its costs of complying with government-mandated programs.

Verizon Wireless also makes similar disclosures in its collateral materials. For example, in the Verizon Wireless User Guide the following language appears: "In addition to the items described above, we charge all customers monthly fees (such as Universal Service and Regulatory fees) related to our governmental costs. *These fees aren't required by law, are subject to change and may vary depending on where you maintain your wireless service*." (emphasis added). In the Verizon Wireless Customer Agreement the following language appears: "Different Kinds of Charges and Surcharges We Set: We also charge monthly fees (such as universal service and regulatory fees) related to our governmental costs. *These recurring fees aren't required by law and are subject to change*." (emphasis added). Finally, before Verizon Wireless raised its Regulatory Charge earlier this year, it provided all of its customers with advance clear and conspicuous notice of such increase, in addition to reminder language that "the regulatory charge is not a tax, it is our charge and is subject to change from time to time." Though the explanatory language regarding Verizon Wireless' line item charges may vary slightly between different collateral pieces, the Bills and all other pieces clearly and consistently convey the same message—that the line item charges are imposed by Verizon Wireless, are discretionary and are not taxes.

### B. Verizon Wireless's Bills Are Not Otherwise Misleading or Deceptive to Customers or Contrary to the FTC/FCC Joint Policy Statement

In its *Petition*, NASUCA states that carriers' surcharges are deceptive, based in part on the Joint FTC/FCC Policy Statement for the Advertising of Dial-Around and

Other Long Distance Services to Consumers ("Dial-Around Joint Statement").[73] In doing so, NASUCA once again attempts to apply a standard to CMRS providers using precedent that is not applicable to the wireless telecommunications industry. The Dial-Around Joint Statement was issued in order to address the *advertising of dial-around and other long-distance telecommunication providers*. The limited applicability of this policy is made clear by the introductory language which states "[l]ong-distance customers have reaped substantial benefits in the form of greater choice in deciding which carrier to use and a greater diversity in the prices charged for those calls . . . . Because no one plan is right for everyone, advertising plays a critical role in informing consumers about the myriad choices in long-distance calling and, in the case of dial-around services, advertising is generally the only source of information consumers typically have before incurring charges."[74] The Dial-Around Joint Policy Statement was not designed to apply, and should not be applied, to wireless carriers' billing practices.

Even if, as NASUCA argues, the advertising standards espoused within the Dial-Around Joint Policy Statement were applicable to the billing practices of wireless carriers, Verizon Wireless's billing practices do comply with such standards. NASUCA correctly points out that that the Dial-Around Joint Policy Statement defines a deceptive advertisement as "one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances[,]"[75] and that, to determine whether or not an advertising practice is likely to mislead consumers, "the FTC looks to

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[73] *Petition* at 39; Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers, *Policy Statement***,** File No. 00-72**,** FCC 00-72, (rel. March 1,2000).

[74] *Id*. at ¶ 1 and ¶ 2.

[75] *Id*. at ¶ 5.

the 'net impression' conveyed to consumers—often described as 'the entire mosaic, rather than each tile separately.'"[76] According to the FTC, in determining the meaning of an advertisement, the important criterion is the net impression that it is likely to make, and such a determination should be made "in light of the sophistication and understanding of the persons to whom [the communication is] directed."[77] Further, the FTC has stated that in examining whether a practice is likely to mislead, "[i]f the representation or practice affects or is directed primarily to a particular group, the [FTC] examines reasonableness from the perspective of that group."[78] The Supreme Court has affirmed this approach by agreeing that in determining whether an advertisement is misleading, the sophistication of the target audience must be considered.[79] In applying the foregoing standards to general billing practices, as opposed to advertising, a wireless carrier's bill would be considered to be deceptive only if it contained a misrepresentation or omission about a material fact such that the net impression of the bill would be likely to mislead typical purchasers of wireless telecommunications services.

In examining the group of consumers to whom wireless carriers' bills are directed, it is important to note that, in the telecommunications world, it has been long-standing practice to assess additional discretionary charges outside of, and in addition to, a carrier's base-rate structure. As such, no reasonable wireless consumer would expect that a telephone carrier's base rate would be inclusive of taxes and surcharges. Consumer expectations and understanding of discretionary line item charges by wireless providers is

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[76] *Id*. at ¶ 6.

[77] *Horizon Corp*., *Final Order, Opinion, Etc. in Regard to Alleged Violation of Sec. 5 of the Federal Trade Commission Act,* 97 F.T.C. 464, 810 n.13 (1981).

[78] FTC Policy Statement on Deception (October 14, 1983).

[79] *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

enforced by the fact that wireless telephone use is increasing at a rapid pace throughout the United States. With the prevalence of wireless telephone usage, the majority of consumers has had experience with one or more wireless service providers and can compare the various fees and other discretionary line-item charges that are not bundled into the rates of any current wireless carrier. The *Petition* asserts that "consumers generally shop among carriers based on the lowest monthly and usage-based rates for the telecommunications service offered, and do not consider the myriad fees and surcharges that also apply."[80] It cites no evidence to support this claim. If Verizon Wireless consumers were misled, deceived, or otherwise confused by the additional fees and surcharges that are applied to its base rates, Verizon Wireless would receive large numbers of consumer complaints to this effect. However, of the number of consumer complaints addressed by Verizon Wireless between January and April of 2004, only *two* were in reference to Verizon Wireless's line item charges. As such, there is no reason for the Commission to take a paternalistic role by assuming that wireless consumers are unsophisticated and unable to make informed choices regarding their wireless service providers.

Verizon Wireless' Bills are not likely to mislead consumers. As discussed in detail above, Verizon Wireless' Bill format breaks down all charges into simple sections, the Bills do not list any discretionary line item charges under the "Taxes, Governmental Surcharges and Fees" section, the Bills do not mischaracterize or mislabel line item charges currently listed in the "Verizon Wireless Surcharges" section in an attempt to

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[80] *Petition* at 11.

mask such charges as government-mandated taxes, and Verizon Wireless's Bills provide complete and non-misleading explanations of all charges.

Thus, Verizon Wireless's customers receive a self-contained summary of all charges and an explanation of the basis of all charges, without being forced to search outside of the four corners of the Bills for explanation or additional clarification. This is hardly a practice that is likely to mislead consumers.

### C. Verizon Wireless's Surcharges Do Not Violate Sections 201 and 202

With little else to rely on, NASUCA makes the argument that even if carriers' surcharges are not in violation of the *TIB Order,* these surcharges should be prohibited anyway because they are unreasonable and unjust under Section 201 and 202 of the Act.[81] NASUCA's rationale is that "those charges either purport to recover costs that the Commission has never authorized the carriers to recover from end users, or greatly over-recover amounts authorized by the Commission."[82] The Commission should reject NASUCA's argument, both because the *Petition* is not the appropriate vehicle to ask the FCC to investigate the conduct of a specific carrier,[83] and, as discussed below, because the FCC has determined that it is unlikely that such violations can occur in a competitive marketplace.

While it is true that the Commission in the *TIB Order* made clear that Sections 201 and 202 would continue to apply separately from the specific requirements that the

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81 *Petition* at 33-34, *citing* 47 U.S.C. §§ 201, 202.

82 *Id.* at 45.

83 If NASUCA believes that a particular carrier has violated Sections 201 and/or 202, it may pursue a complaint, but it would be required to present evidence to support its allegations. Its *Petition* offers no such specific evidence but instead demands a blanket ban on all line item charges, regardless of how they are communicated and disclosed by carriers to their customers. This cannot supply a basis for a necessarily individualized Section 201/202 inquiry.

FCC adopted in the *TIB Order,*[84] the Commission also established that the principles and guidelines that it adopted in the *TIB Order* were intended to define specifically what would constitute a violation of Section 201 in the billing context for covered carriers.[85] Thus, while it is conceivable that compliance with the principles of the *TIB Order* would not be sufficient to immunize a carrier from allegations under Section 201 and 202, NASUCA has relied only on claims that carriers have violated the *TIB Order*. For example, with respect to NASUCA's claim that carriers are recovering unauthorized costs or greatly over-recovering such costs, apart from the specific surcharges that the FCC has authorized, in the *TIB Order* the FCC refused to place restrictions on the types of costs that carriers could recover, instead preferring to permit carriers the freedom to respond to market forces.[86]

The Commission has stated a preference in the context of considering claims under Sections 201 and 202 for allowing competitive forces rather than FCC regulation to govern carriers' actions in the marketplace.[87] Accordingly, "the Commission has considered the existence of robust competition in the CMRS market when determining whether a violation of [Section 201(b) or Section 202(a) of the Act] has occurred."[88] For example, in the *Orloff Order*, the FCC found that Vodafone's concessions policy did not violate Section 201(b) or 202(a) because market forces protect consumers from

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84 *TIB Order,* 14 FCC Rcd at 7502-03, ¶ 19.

85 *Id.* at 7506, ¶ 24.

86 *Id.* at 7526, ¶ 55.

87 *SBMS Order*, 14 FCC Rcd at 19898.

88 Jacqueline Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless, *Memorandum Opinion and Order*, 17 FCC Rcd 8987, 8995, ¶ 18 (2002) ("*Orloff Order*") *aff'd sub nom Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied,* 2004 U.S. Lexis 4614 (U.S. June 28, 2004).

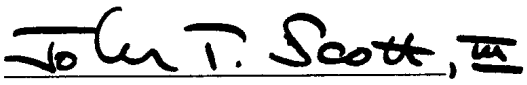
unreasonable discrimination and unjust or unreasonable practices.[89] Similarly, in *Kiefer v. Pagenet,* the Commission found that a fee imposed by a paging carrier on past due balances was not unreasonable under Section 201(b) of the Act. In reaching this decision, the Commission stated that "the existence of a competitive market should be considered in determining the existence of a section 201(b) violation."[90] Thus, the FCC and the courts have established a high hurdle for establishing claims for violations of Sections 201 and 202 in a competitive environment.

## CONCLUSION

For the foregoing reasons, the FCC should deny the *Petition.*

Respectfully submitted,

**VERIZON WIRELESS**



John T. Scott, III
Charon H. Phillips
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
202-589-3740

July 14, 2004

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89 O*rloff Order*, 17 FCC Rcd at 8995-8997.

90 Kenneth Kiefer v. Paging Network, Inc. d/b/a Pagenet, *Memorandum Opinion and Order*, 16 FCC Rcd 19129, 19132, ¶ 7 (2001). The Commission also noted that the existence of the carrier's billing practice on a more widespread industry basis in the past should contribute to the determination that a practice was lawful under Section 201. Here, too, carrier practices have long included separate line items for non-mandatory fees.